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IN THE

Supreme Court of the United States

October Term, 1973

Docket No. 73-361

AUGUSTE JOSEPH RICORD,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Auguste Joseph Ricord, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit of June 6, 1973 affirming the judgment entered against him in the District Court for the Southern District of New York on January 29, 1973.

On Order extending petitioner's time to file this Writ until August 27, 1973 has heretofore been granted by Mr. Justice Marshall.

A. The Opinion Below.

On June 6, 1973, on the Petitioner's appeal to the United States Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed on that date from the bench without opinion. The judgment of affirmance of the United States Court of Appeals for the Second Circuit is annexed hereto and marked Appendix A. On June 28, 1973, Petitioner's application for a rehearing on his appeal was denied without opinion. This order also is annexed hereto and marked Appendix B.

B. Jurisdiction.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented.

1. Does the Fifth Amendment mandate dismissal of the indictment obtained below since the prosecutor, an Assistant United States Attorney, was the only witness before the Grand Jury and his testimony was 100% hearsay of an available live witness?

2. Does the Fourth Amendment mandate dismissal of the indictment since petitioner, charged with a crime of which possession is an element, was denied standing to attack an illegal search and an evidentiary hearing ordered by the Circuit Court was a farce?

3. Since no one testified to any acts or conversations evidencing guilty knowledge on the part of petitioner, does this failure by the Government to prove the essential element of "knowledge" in the conspiracy count mandate

either dismissal of the indictment or a new trial for the petitioner?

4. Do the actions of the United States in forcing Paraguay to extradite petitioner constitute an "act of bad faith toward the government" of Paraguay and deny petitioner his liberty and freedom without due process of law as required by the Fifth Amendment?

5. Did petitioner receive a fair trial?

D. Constitutional Provisions, Statutes and Rules involved are as follows: This material is attached as Appendix C.

E. Statement of the Case.

The petitioner Auguste Joseph Ricord was convicted in the United States District Court for the Southern District of New York before the Honorable John M. Cannella and a jury on a one-count indictment charging conspiracy to violate federal narcotics laws 21 U.S.C. 173, 174, which laws have since been repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Petitioner was sentenced to imprisonment for a term of twenty years and a fine of $20,000.00 plus costs of prosecution.

Statement of Facts

The uncontradicted facts are that Auguste Joseph Ricord, who speaks no English, was resident in South America for some twenty years prior to this case without any criminal conviction. He had built a score of restaurants and had recently completed construction of the Paris-Niza Motel (named after the Paris-Nice Railway) in Asuncion, Paraguay.

In late 1970 some six individuals were arrested in Miami and New York by Federal Authorities after a large quantity of narcotics had been seized without a warrant from a parked, locked and tied down airplane at a local airport in Florida. Each of those arrested gave statements which did not implicate nor even refer to Mr. Ricord. In December of 1970 two of those arrested escaped from the Federal Detention Headquarters in New York City.

Some months later, after prolonged incarceration together and repeated questioning, two of the remaining prisoners agreed to cooperate with the Government. They changed their statements and identified a photograph of Ricord to a grand jury, as a result the original indictment naming Ricord as a defendant was obtained.

Mr. Ricord had never been in the territory of the United States, had violated no laws of Paraguay or Argentina, the two countries where he maintained residences and was not a fugitive. He had no record of arrests or convictions relating to narcotics.

A formal request for his extradition to the United States was denied by the Courts of Paraguay. This decision was later overturned as hereinafter set forth.

At trial in December 1972 in the Southern District of New York, Petitioner was convicted upon the testimony

of three alleged co-conspirators. Each of these witnesses was an admitted liar and narcotics smuggler of long duration. They had been arrested in the United States; they were all aliens; they were in jail facing serious criminal charges and long prison terms. There was no other evidence implicating petitioner in any way. Still further, there was no testimony as to any conversation in which petitioner referred to narcotics. One of the three witnesses testified that petitioner helped him carry innocent appearing luggage from a rented motel room at the Paris-Niza Motel to a car, and that such luggage contained the narcotics involved in this case. There was no other proof of any physical contact by petitioner.

This Courts attention is respectfully directed to the following significant procedural chronology of this case in the Southern District of New York.

1. *Defendant is brought to the United States* for the first time—September 3, 1972

2. Defendant first meets Herbert I. Handman, Esq. and retains him as counsel—September 11, 1972

3. A motion was made to recuse Judge Cannella

4. *The Superceding Indictment is filed*—October 3, 1972

5. Defendants pre-trial motions—October 13, 1972

6. *Particulars are furnished* by the government in four separate stages:

   October 17, 1972

   October 27, 1972

   October 31, 1972 and

   November 6, 1972

7. A further *written suppression motion* and memorandum of law is filed—November 15, 1972

8. Defense counsel goes to Paraguay to inspect place of alleged occurrances—November 18 through November 23, 1972

9. *Motion to take depositions* of witnesses in Paraguay is filed—November 28, 1972

10. *Application for adjournment of trial* is filed—November 28, 1972

11. Defense counsel goes to Paraguay to take depositions —November 30 through December 2, 1972

12. *Writ of Mandemus* is argued in Court of Appeals requesting adjournment of trial and hearing on suppression motion—December 4, 1972

13. *Trial commences*—December 4, 1972

TIME ANALYSES

Defendant in United States until trial—13 weeks

Indictment until trial—8½ weeks

Completion of Government's particulars until trial—3½ weeks

POINT I

The procedure by which the Indictment of Petitioner Ricord was secured, Constituted a Blatant Violation of the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides among other things that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor be deprived of life, liberty or property without due process of law; * * *"

The only witness before the Grand Jury which returned the indictment in the instant case *was the Prosecutor,* Assistant United Sates Attorney Phillips.

His testimony was 100% hearsay.

The person whose hearsay he quoted was alive and readily *available to testify.*

The Petitioner's motions to dismiss the indictment due to the method employed in securing it were disposed of summarily by the Trial Court. The Government supports this action on the authority of *Costello* v. *United States,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956).

This only witness before the Grand Jury, Assistant United States Attorney Phillips, stated under oath:

> "The evidence presented to the grand jury which voted the superseding indictment consisted of the prior grand jury testimony of Felix Becker, an accomplice of Ricord's who testified before the grand jury which voted the original indictment. Becker's

> original testimony was identified by the court reporter who had taken it and was read to the grand jury by myself. In addition an affidavit sworn to by Becker and submitted "as part of the extradition papers was identified by an agent of the Customs Bureau and also read by me to the Grand Jury" (Affidavit of Assistant United States Attorney Phillips sworn to March 27, 1973).

The Felix Becker referred to in Phillips statement was readily available, being a Federal prisoner. Becker was one of the principal Government witnesses at the subsequent trial and that he would be such a witness was well known at the time of the grand jury proceedings above referred to.

Petitioner submits that *Costello* was never meant to cover a case such as this and that there is nothing in the *Costello* case which even remotely resembles the facts of the instant case.

If *Costello* does stand for the proposition that a prosecutor may go before a Grand Jury and secure an indictment by reading to that Grand Jury, an available living person's previous testimony before a different grand jury and an affidavit of that person, then *Costello* should be overruled.

Petitioner submits, however, that *Costello* does not stand for any such outrageous proposition.

There has been so much said and written about the *Costello* case and what it does or does not stand for that it is not amiss to go back and look at the actual facts of that case and what was really decided.

In the *Costello* case the indictment was based solely on the testimony of three agents who had investigated the financial transactions and expenditures of Costello

and his wife for the tax years of 1947, 1948 and 1949. These three agents testified at the trial and cross-examination developed the facts as to the grand jury presentation being technically hearsay and these three agents the only witnesses. At the *Costello* trial there were some 144 witnesses and 368 exhibits. After the proper groundwork had been laid by witnesses with first hand knowledge, these three agents had been permitted to take the stand and summarize the vast amount of evidence which had been produced.

The opinion of the Court delivered by Mr. Justice Black starts out with following statement:

> "We granted certiorari in this case to consider a single question: "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?"

In view of the Courts affirmativve answer to this question the case has been used as a universal authority for the proposition that an indictment supported entirely by hearsay is a valid indictment and complies with the Fifth Amendment guarantee of an "Indictment by a Grand Jury."

However, nowhere does *Costello* hold or even intimate that indictments are inviolable to attack for lack of due process or other procedural or substantive defects of constitutional dimension. It has sometimes been referred to as doing so but the cases where this has happened turn on other points.[1]

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[1] *Lawn* v. *United States*, 355 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958). The question of hearsay was not even involved, rather the possible use of evidence secured in violation of a defendants constituional rights. The court found no basis, "beyond suspicion," for the defendant's challenge to the indict-

[Footnote continued on next page]

Perhaps one of the best appraisals of the *Costello* case is that of Judge Jack Weinstein in *United States* v. *Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968), *aff'd*, 405 F.2d 39 (2d Cir. 1968):

> "There is no reason to believe that the Supreme Court in *Costello* intended to encourage the practice before grand juries of deliberately relying solely on the testimony of witnesses without any personal knowledge when better evidence is readily at hand. Rather, *Costello* seems to have been designed to avoid technical failures of indictments because hearsay or other inadmissible evidence was used either inadvertently or because nothing more probative was immediately available."

Mr. Justice Burton in his concurring opinion in *Costello* had this to say about the opinion of Mr. Justice Black:

> "I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declarations made by the Court. I would assume that the Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. * * *."
>
> * * * * *
>
> "Here, * * *, substantial and rationally persuasive evidence apparently was presented to the grand jury. * * *."

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ment. The reference to *Costello* was gratuitous and also inaccurate.

United States v. *Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966). Again the question of hearsay was not involved but the possible use of tainted evidence. A footnote to the opinion states: "It does not seem to be contended that tainted evidence was presented to the grand jury;" The footnote goes on to say that "this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See *Costello* v. *United States; Lawn* v. *United States.*"

The United States Court of Appeals for the Second Circuit has passed on the matter of the use of hearsay evidence before the Grand Jury in a long series of cases, whether from its supervisory authority or the due process clause of the Fifth Amendment or other mandates, the Court has over and over again warned the Government prosecutors that where live witnesses are available, the use of hearsay will not be further countenanced under pain of dismissal.[2]

The last case in this series, is *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972). In that case the conviction was reversed and the indictment dismissed. The following quotation from the opinion by Friendly, *C.J.*, sets forth the attitude of the Second Circuit toward the use of hearsay, p. 1136.

> "When the framers of the Bill of Rights directed in the Fifth Amendment that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,' they were not engaging in a mere verbal exercise. The importance of avoiding undue reliance upon hearsay before a grand jury, is heightened by this circuit's view that an indictment

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[2] *United States* v. *Andrews*, 381 F.2d 377 (2d Cir. 1967); *United States* v. *Payton*, 363 F.2d 996 (2d Cir. 1966); *United States* v. *Heap*, 345 F. 2d 170 (2d Cir. 1965); *United States* v. *Beltram*, 388F. 2d 449 (2d Cir. 1967); *United States* v. *Borelli*, 366 F.2d 376 (2d Cir. 1965) *cert. denied* under name *Cinquigrano* v. *United States*, 379 U.S. 960, 85 S. Ct. 647, 13 L. d. 2d 555); *United States* v. *Messina*, 388 F. 2d 393, (2d Cir. 1968) *cert. denied* 390 U.S. 1026 88 S. Ct. 1413, 20 L. Ed. 2d 283; *United States* v. *Umans*, 368 F.2d 725 (2d Cir. 1966) *cert. denied* 389 U.S. 80 88 S. Ct. 253, 19 L. Ed. 2d 255 (1967); See also *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964).

> constitutes a finding of probable cause and avoids the need for a preliminary hearing under F. R. Cr. P. 5(c). *Sciortino* v. *Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906, 88 S. Ct. 820, 19 L. Ed. 2d 872 (1968)."

The vice here is not just that hearsay was used to secure the indictment. The vice here is that taking into consideration the procedural and substantive laws and decisions in the Second Circuit, petitioner has been denied due process of law and a right to a fair trial.

As Judge Weinstein said in his decision in *United States* v. *Arcuri, supra,* in condemning the use of hearsay:

> "The second reason the practice is undesirable is that it prevents the defendant from utilizing grand jury testimony in cross-examining witnesses who will testify at the trial. Since no witness the government intends to use is called before the grand jury, it avails a defendant little to have the grand jury testimony furnished to him at the trial. * * *.
>
> "When a government witness testifies, and defense counsel seeks his grand jury testimony for use in cross-examination, he is met with the answer that the witness did not testify before the grand jury. Taken with the concurrent prosecution tactic of avoiding preliminary hearings * * * the net effect is to cut the defendant off from material which should be available to him as a partial substitute for discovery proceedings."
>
> * * * * *
>
> "We are informed that the practice challenged in the present case no longer represents the policy of the United States Attorney in this district and that witnesses with personal knowledge are now relied upon wherever possible. * * *."

> "Accordingly a timely motion to dismiss an indictment handed down after [this week] will be granted without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury. * * *."

Section 102(d) of the Organized Crime Control Act places the recorded grand jury testimony within the definition of the term "statement" under subsection (e) of the Jencks Act. It would be hard to conceive of a more blatant way of nullifying this statute than to do what was done in the instant case.

In the Second Circuit the grand jury testimony of any government trial witness has been made available since the decision of the Court of Appeals in that Circuit in *United States* v. *Youngblood,* 379 F.2d 365 (2d Cir. 1967) which contained a prospective direction to that effect.

The method used by the prosecution in the instant case also was in direct contravention of the mandate of the *Youngblood* case.

Unless this Court intervenes to dismiss the indictment in the instant case, it is easy to imagine what will happen.

All a prosecutor will have to do is to go before a Grand Jury and tell that Grand Jury what his prospective government witnesses are going to testify to at the trial.

The whole Grand Jury proceeding will become a farce and the Fifth Amendment guarantee of a Grand Jury Indictment and due process of law will have been wiped out by a clever prosecution manoeuver.

In the instant case, the prosecution furnished as 3500 or Jencks Act material the prior grand jury testimony and

affidavits which had been read to this indicting Grand Jury by Assistant United States Attorney Phillips, as they undoubtedly came within the statutory requirement. This provided the defense with some impeachment and cross-examination background.

This fact, however, does not alter the vice and unconstitutionality of the procedure followed in the instant case. The indicting grand jury was precluded from asking any questions of Becker as might very well have happened had he been live before them. Furthermore, if the procedure followed in the instant case is not overturned, the next step will be for the prosecution to make sure that it carefully avoids having any material which comes within the Jencks Act.

The Government's bald and open position is that the method of securing the indictment in this case is authorized by *Costello* and within the guidelines set by the Court of Appeals for the Second Circuit.

It must be remembered that the *Arcuri* case, *supra,* was affirmed by the Second Circuit. Subsequently in *United States* v. *Liebowitz,* 420 F.2d 39 (2d Cir. 1969), that court stressed that:

> "* * * We admonished prosecutors regarding the over-use of hearsay evidence in the presentation of government cases to grand juries, but we have consistently upheld indictments based upon hearsay evidence, * * * even though use of hearsay before the grand jury deprives a defendant of the opportunity to impeach witnesses at trial with prior inconsistent statements made to the grand jury. * * * Indictments obtained principay or wholly upon the basis of hearsay evidence, even though direct testimony was available, will not be dismissed unless it appears that dismissal is required to protect the integrity of the judicial process."

The court goes on to give some examples of protection of the judicial process. One is where "the grand jury is misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed" (p. 42). See also *United States* v. *Payton*, 363 F.2d 996, 988-999 (2d Cir. 1966). Another example is where the defendant can show a high probability that with eye-witness as against hearsay there would have been no indictment.

In the instant case the Government in its brief before the Circuit Court makes the following flat statements:

> "The rule in this Circuit, however, is that indictments obtained wholly on hearsay evidence will not be dismissed *unless*" (and then goes on to quote one of the example referred to above from the *Leibowitz* case).
>
> "the grand jury is misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed."

This use by the Government in the instant case of *Leibowitz* is completely unjustified and indicates the extent to which the prosecutor is willing to try and stretch the *Costello* case. What Leibowitz said is

> "*unless it appears that dismissal is necessary to protect the integrity of the judicial process.*"

Petitioner submits that this instant case is such a case. The only grand jury witness was the Assistant United States Attorney prosecuting the case—the only evidence was his hearsay reading of statements of a readily available government witness of crucial importance.

In considering the integrity of the judicial process, let us not forget that the Fifth Amendment of the United States Constitution is still in force and as Honorable Judge Friendly said in the *Estepa* case "When the framers of the Bill of Rights directed in the Fifth Amendment that 'no person shall be held to answer for a * * * crime, unless on a presentment or indictment of a Grand Jury', they were not engaging in a mere verbal exercise."

This matter is of great importance beyond the question of material for cross-examination and impeachment of government witnesses by defense counsel. As Honorable Judge Weinstein said in the *Arcuri* case, *supra*:

> **"The practice, as in the instant case of relying on hearsay rather than upon the testimony of eye witnesses is pernicious for two reasons. First, it habituates the grand jury to rely upon 'evidence' which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examination nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of the events. Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically a prima facie case may have been made out. It is, moreover, unlikely to demand additional evidence."**
>
> **(The second reason is quoted above practically *in extenso*, at page 12).**

Finally, if there is any constitutional basis for the Second Circuits' Rule about the use of hearsay before the Grand Jury, whether in the specific language of the Fifth Amendment or the "due process" clause, or otherwise, the method of securing this indictment clearly violated that Rule.

And last but not least, to uphold the procedure openly and admittedly used by the prosecutor is to abolish the Fifth Amendment requirement of an Indictment—for what happened here is nothing more nor less than an information read to the Grand Jury and rubber stamped.[3]

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[3] Petitioner will not attempt to set forth the statistics and authorities as to the "rubber stamp" quality of the Grand Jury today. The legal peridoicals are filled with articles which can best be summed up by the remark of an anonymous trial lawyer that a prosecutor could persuade a Grand Jury "to indict an asthmatic for sneezing." Oaks and Lehman. *A Criminal Justice System and the Indigent*, 44 n. 75a (1968).

POINT II

The warrantless searches and seizures of the drugs were in violation of the Fourth Amendment and the denial of the suppression requires reversal of the conviction.

The chronology of the events leading up to an evidentiary hearing which was held at the beginning of the trial is important as bearing on the Trial Court's questionable conduct and also the merit of the motions.

A motion to dismiss the indictment on the basis of the illegal search and a motion to suppress were both made pre-trial.[4] These motions were denied by the Trial Court on the basis that petitioner lacked standing.

After the Government's Bill of Particulars on October 27, 1972, stating *"The heroin was the property of Ricord"*, petitioner renewed the motions in writing on November 15, 1972 accompanied by a memorandum of law and asked for an evidentiary hearing (Appendix E). The Government opposed such a hearing pre-trial and urged by affidavit of November 20, 1972 that any evidentiary hearing on the illegality of the search and seizure be held post-verdict (Appendix F).

The Trial Court acceded to the Government's request and set the trial date for December 4, 1972. Petitioner applied to the Circuit Court of Appeals for a mandamus to the Trial Court to hold a pre-trial as opposed to a post-verdict so-called "taint hearing" and a stay of the trial (Appendix H).

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[4] At the time the first motions were heard on October 16, 1972, the Government had not furnished the Bill of Particulars of October 27, 1972 in which it uniquovocally took the position that the heroin seized belonged to Petitioner, nor had Petitioner been informed there were two searches and seizures not one.

On December 4, 1972 the morning when the trial was to commence, the Circuit Court directed the Trial Court to hold such an evidentiary hearing pre-trial. That same day the Second Circuit put a stop to the vicious and questionable practice of reserving the determination of such pre-trial motions until after the jury verdict of guilty.[5]

Although petitioner's counsel had in his motion papers set forth various witnesses and documentary evidence which would be material and relevant to such an evidentiary hearing, the Trial Court, after being informed of the action of the Circuit Court, refused to give the defense

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[5] In *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972) decided the same day December 4, 1972, the Circuit Court reversed a conviction of Birrell with instructions to dismiss the indictment. The following excerpt from the Courts opinion covers this matter fully (709):

> "Birrell's principal contention on appeal is that the initial lead which induced the Government to subpoena the witness and documents used at trial was obtained in a manner violative of the search and seizure provision of the Fourth Amendment. No hearing was held on Birrell's motion to suppress; rather each side submitted affidavits, on the basis of which the judge ruled that no hearing was necessary since he could reconsider the matter and grant a hearing, if this seemed desirable, in the event of a conviction. When a motion to suppress has been made prior to trial, we do not approve such an extension of the practice of postponing a "taint" hearing until after verdict, which was devised by the late Judge Herlands to meet the exceedingly hard problem confronting him in another prosecution of the appellant, *United States* v. *Birrell*, 269 F. Supp. 716 (S.D.N.Y. 1967); in such cases there may indeed be serious difficulties in conducting a "taint" hearing until the court knows what evidence the Government will offer. Here the issue was not "taint" but the legality of the search. It was clear, as the Government conceded at argument, that if the search was illegal, all the evidence with respect to Birrell's employment to be offered at trial would be tainted."

Curiously enough the prosecutor in the Birrell case was the same Phillips that prosecuted the petitioner.

time to prepare for such hearing. On the contrary, immediately the same morning of the 4th of December, 1973, the Trial Court commenced what was termed by his Honor the hearing required by the Circuit Court's direction which occurred an hour or so earlier. Three Government agents then available in New York testified .

The hearing was adjourned to December 5, 1972 at 9:00 A.M. at which time two Government agents were to be present. Other witnesses were requested by the defense, who were not then available. Symptomatic of the Trial Court's reaction to the direction to have the evidentiary hearing prior to the trial was the comment when the anonymous letter which triggered the investigation which resulted in the search and seizure was produced.

> "Mr. Handman: Your Honor, this is going to take me a few minutes to digest.
>
> The Court: Go ahead and digest it. I can wait. I have been waiting on you before, so there is no reason I can't wait now."

The morning of December 5, 1972, the evidentiary hearing witnesses did not show up. The court immediately proceeded with the selection of the petit-jury, which was empaneled and sworn and luncheon recess declared. After lunch both the Government and defense, pursuant to the direction of the Trial Court, opened. A recess was then taken and the court in the absence of the jury reopened the evidentiary hearing on the motion to suppress. One Bianchi, the pilot of the airplane, which was the subject of the search, was called as a witness. Bianchi was accompanied by an attorney. Bianchi refused to testify after what petitioner submits was in substance the suggestion of the Trial Judge and at least inferentially an arrangement

with the prosecutor. The Trial Judge refused to allow the defense to ask Bianchi a single question (Appendix D).[6]

Not until January 29, 1973, the day of the sentencing of the petitioner, did the Trial Court become sufficiently concerned about the illegality of the search and seizure to write an opinion to bolster the almost incredible conduct of the Trial Court and the prosecution with respect to this matter (Appendix G). It is possible that this opinion of January 29, 1972 was thought necessary in the light of petitioner's motion for a new trial filed January 22, 1973, after the jury verdict and prior to sentencing.

The Trial Court's opinion with respect to the motion to suppress is almost as ludicrous as the evidentiary hearing.

To begin with the opinion states (page 4 Appendix G):

> "At the outset, the court finds that the defendant lacks standing to challenge the validity of the search."

There follows a citation of cases which in no way support this holding if it is one.

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[6] This same Bianchi on December 5, 1972 at the time of his refusal to testify was a co-defendant who had confessed and the Government had prepared him to testify as a witness against petitioner. The very next day he did so testify. The trial of his case was severed on the motion of the Government on December 5, 1972. A more flagrant abuse of the required conduct of a prosecutor could scarcely be found. Especially in the light of *Olmstead* v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). It is also significant that the refusal of the trial judge to permit defense counsel to ask any questions of Bianchi is clearly violative of the law. *United States* v. *Saewald*, 450 F.2d 1159 (2d Cir. 1971), *cert. denied*, 405 U.S. 978. *California* v. *Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971).

Petitioner submits that it is an imposition on the time of the court to argue this point as the Trial Court in effect admitted the completely fatuous character of this position by granting and holding an evidentiary hearing. Especially so, since the Government's Bill of Particulars asserted as set forth above that the seized heroin was the property of petitioner.

United States v. *Jeffers,* 342 U.S. 48 (1950);

Jones v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960);

Wong Sun v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963);

Alderman v. *United States,* 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969);

F.R.C.P., Rule 41.

The Trial Court in its opinion went on to support the warrantless searches and seizures on the following grounds:

1. Probable cause.
2. A border search.

Fortunately for the petitioner this Court on June 21, 1973, decided the case of *Sanches* v. *United States,* Docket N. 71-6278 involving an analogous situation.

The opinions in that case discuss in detail warrantless searches and so-called border searches.

The net effect of that case and all of the opinions concurring and dissenting is that no mater what the circumstances may be, if a search warrant can be secured without any possibility of loss of the opportunity to effect the search, the Fourth Amendment requires a warrant.

The petitioner submits that in this case, there was adequate opportunity to secure a warrant and no excuse for not doing so.

The facts are clear and unequivocal and it is the facts which control, not wishful thinking or excuses.

The facts are as follows:

The narcotics which were the basis of petitioner's prosecution were seized after a warrantless search of a CESSNA airplane by agents of the Government. This warrantless search and seizure took place at North Perry Airport, a small local airport near Miami, Florida. This plane had been under constant surveillance since its arrival at Miami International Airport the previous day. After the plane arrived at North Perry, it had been blocked, tied down and locked. Upwards of ten armed agents (F.B.I., B.N.D.D. and Customs) staked out the airplane and such stake out was continued until the search and seizure which took place some 16 hours later. During the stake out an inspection of the plane by one of the agents had disclosed the presence of the three valises later seized from the airplane and which valises contained the narcotics involved. No effort was ever made to secure a warrant.

The Trial Judge undertook to support this search and seizure in his belated January 29, 1973 opinion on the following grounds:

> "In any event, the court finds the search to be legal and valid in all respects. It was conducted with probable cause and was not unreasonable. From the totality of the knowledge possessed by the Customs Agents and others, there was sufficient probable cause to conduct the search. It was reasonable for them to assume that the aircraft was smuggling narcotics into the United Stats. The court is not persuaded that a search warrant should have been obtained even

> though there is evidence that the plane was parked and its wheels chocked with lines attached.[3] We are not concerned here with the search of a house or even a motor vehicle, but with a speedy, not readily pursuable light aircraft that could with ease take off and disappear possibly to Cuba or some other caribbean Island."
>
> • • • • •
>
> "3. although the aircraft was secured in this fashion, it could easily have been freed in a matter of seconds. See Hearing Minutes, p. 60."

Even were the factual assumptions correct this reasoning of the Trial Court is obviously rationalization, for with the stake out, if there had been any effort to move the airplane, those making such an effort could have been arrested with probable cause and any such movement of the airplane prevented.

There just is no excuse for the agents not having secured a search warrant.

The Trial Court in a further effort to bolster the legality of the seizure said (Appendix G, p. 6):

> "Furthermore, the court concludes that the agents conducted a valid border search."

The Court went on to cite 19 U.S.C. Section 482 and various border search cases, carefully omitting *United States* v. *Almeida Sanches,* 452 F.2d 459 (9th Cir. 1971) where certiorari had been granted by this court but not yet heard or decided, 406 U.S. 944.

The *Sanches* case has now been heard and decided (Docket No. 71-6278, June 21, 1973) and petitioner submits is dispositive of this question of the necessity of a search warrant in this case.

Any search to qualify as a border search would have had to take place at Miami International Airport, which was the functional equivalent of the border.

Once this airplane was in the interior of the United States parked at the local North Perry Airport, any search and seizure is governed by the legal principles so carefully discussed and analyzed in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

Whatever else may or may not be argued or urged, the wholly inexplicable failure of the agents to secure a Search Warrant condemns the search and seizure here involved and requires a reversal of the conviction.

Before leaving this point petitioner wishes to allude to the Trial Court's procedure in interrupting the suppression evidentiary hearing to empanel the trial jury, and insisting on the openings. Taken together with the constant pressure on defense counsel to proceed without time to make reasonable arrangements for witnesses, etc., petitioner submits that the whole matter of the evidentiary hearing was a farce as the Trial Judge had prejudged the question and reluctantly went through the motions of an evidentiary hearing only because of the direction of the Circuit Court.

POINT III

Since no one testified to any acts or conversations evidencing guilty knowledge on the part of petitioners the Government failed to prove the essential element of "knowledge" in the count of conspiracy to violate Title 21, U.S.C. §§ 173, 174.

To sustain a conviction for conspiracy to violate Title 21, U.S.C. §§ 173, 174 it is necessary to prove knowledge. *Ingram* v. *United States,* 360 U.S. 672, 678, 79 S. Ct. 1314, 1319, 3 L. Ed. 2d1503 (1959) ("conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense"), *United States* v. *Lasalandra,* 421 F.2d 1261 (2d Cir., 1970), cert. denied, 398 U.S. 931. Section 174 contains an extraordinary provision which allows the Government to make out a prima facie case without the necessity of proving knowledge directly: the jury *may* (emphasis added) draw an inference of knowledge from the mere fact of possession of the proscribed narcotic, unless the defendant otherwise explains the possession to the jury's satisfaction.

In the instant case there is not a shred of proof in the record that the petitioner ever knew that the substance which he allegedly conspired to import was heroin. No witness had any conversation with petitioner in which narcotics or heroin was alleged to have been mentioned. Indeed one of the main conspirators, a prosecution witness, says that he learned that his own activities involved heroin only shortly before his arrest, well after his arrival in this country and long after his last contact with petitioner.

In *United States* v. *Febre,* 425 F.2d 107 (2d Cir., 1970), cert. denied, 400 U.S. 849, the defendant had been convicted of violating § 174, and of conspiracy to violate § 174.

The defendant conceded that the evidence sufficed to prove that he had facilitated the transportation of heroin, but claimed that there was no proof of knowledge, and no proof of possession. The Court of Appeals reversed those counts as to which the only evidence was that the defendant was in an apartment with another conspirator who subsequently emerged with heroin. The Court said that in such a case there was no "possession", actual or constructive, and listed the indicia of "constructive possession" as follows:

> "Properly admitted evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to the means of transfer, or was able to assure delivery" (at page 111).

Not even one of these requirements is present. It is nowhere contended that this petitioner did any of these in respect to the narcotics involved in this case. The Court held further that "possession, actual or constructive, must be shown with respect to each individual conspirator," 112 (Quoting in last case from *United States* v. *Hernandez,* 290 F.2d 86 (2d Cir. 1961). Possession of a co-conspirator cannot impute possession to defendant.

In *United States* v. *Steward,* 451 F.2d 1203 (2d Cir., 1971), the defendant communicated details of a plan to sell heroin to a "buyer" who was a Government informer, and was convicted of conspiracy to violate § 174. The Court found no possession and therefore no knowledge, since the defendant, who was in jail at the time of the transaction, did not have "power to control the disposition of the drugs such as to constitute constructive possession." The defendant was found to be a "mere casual facilitator," and the conviction was overturned.

In *United States* v. *Steward,* 451 F.2d 1203 (2d Cir., 1971), the Court overturned the defendant's conviction under §§ 173, 174, and conspiracy to violate § 174. The

defendant was the armed chauffeur of the car which transported a third party carrying heroin on his person to the place of sale. Yet this degree of association was found not to constitute constructive possession.

The Government here contended at pages 29 and 30 of its brief to the Court of Appeals that the petitioner's knowledge of the heroin was "overwhelming" citing

a) its being removed from a motel room at a hotel where appellant was working;

b) the "amount of heroin involved";

c) a conversation between appellant and the witness who testified that he (the witness) did not know that heroin was involved in the conversation; and

d) alleged observation of the receipt of funds by appellant from another person charged as a co-conspirator which is said to have taken place in Paraguay without the witness being able to hear any of the conversation.

It is respectfully urged that these indices characterized as "overwhelming" by the Government do not comply with the legal requirements heretofore imposed on prosecutions under this law.

POINT IV

The actions of the Government of the United States in forcing Paraguay to extradite petitioner was an "act of bad faith toward the Government" of Paraguay, which "entails international consequences", and violates "a rule of what we would now call United States foreign relations law devised by the courts."

Upon receiving and considering a formal request for extradition, the Paraguayan court rendered its opinion denying extradition in which it stated the following:

> "Since the offense of dealing with drugs and narcotics is not explicitly included in the Treaty, that agreement cannot well be invoked by one of the parties to demand the extradition of the person . . ."
>
> "It is necessary that the criminal act that constitutes the ground for the persecution be considered such not only by the laws of the country where it was committed, but also by those of the State where the Court exercises its functions (lex fori)."
>
> "The second requirement set forth by the Treaty is that the OFFENSE HAD BEEN COMMITTED WITHIN THE JURISDICTION OF ONE OF THE CONTRACTING PARTIES AND PROVIDED THE PERSON WHOSE EXTRADITION IS REQUESTED WAS ACTUALLY IN THAT JURISDICTION AT THE TIME THE OFFENSE WAS COMMITTED:"
>
> "The accusations emanating from Becker and Gahou are devoid of value in the pursuit of the case in accordance with our laws inasmuch as they accuse Auguste José Ricord of participation, in view of the fact that both are under detention. In fact,

> according to our laws, the co-accused are under no circumstance requested to make statements under oath nor to promise to state the truth (Article 196 of the Code of Criminal Procedure)."
>
> " 'To be free men we must be slaves to the law' " (Appendix, pages 67-89).

Petitioner has offered to prove that the United States Executive bribed [7] and extorted the Government of Paraguay to subvert this holding of its judiciary. The extradition of this petitioner was thus obtained by forcing the courts of Paraguay to succumb to economic and political pressure wholly foreign to every principle of American justice and respect and obedience to the law, both domestic and foreign.

In *Fiocconi* v. *Attorney General of United States*, 462 F.2d 475 (2d Cir., 1972) the court set forth its position with regard to extradition in cases that affect the courts, laws or policies of foreign governments.

Preliminarily, the court noted and reiterated a universally accepted principle when it stated that the

> ". . . [T]he Italian Government could grant extradition as an act of comity when the offenses for which this was requested were also crimes under the law of Italy, provided that the relevant treaty did not prohibit extradition for the offenses in question (which the American-Italian Convention did not), and that the offenses with which Fiocconi and Kella had been charged in the United States were in fact crimes under Italian law . . . " (at page 477).

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[7] A special presidential envoy admitted his meetings and conversations with both the President of Paraguay and members of its judiciary in this regard. He is Nelson Gross, and is presently under indictment in the Federal District Court in the State of New Jersey charged with similar acts.

After considering this problem in depth, Judge Friendly, in the *Fiocconi* opinion, says, "the Court developed a rule of law providing . . . a judicial remedy for . . . violation of international law" and clearly indicated that this Court would not suffer actions which "violated a rule of what we would now call United States foreign relations law devised by the courts to implement the treaty" (at page 479).

In *Fiocconi,* the court had to determine whether a prosecution of defendant for another offense, similar to the one for which defendant was properly extradited, violated this rule. The holding was that it did not.

However in reaching this conclusion this Court considered every facet of the case and justified its conclusion on the following stated grounds, *inter alia,* to wit:

> "That the language of the treaty itself supported the finding of this Court (page 481)."

Now, this Court is respectfully urged to recognize the very existence of the "United States foreign relations law" and demand inquiry into the facts as they might reflect compliance with its mandates.

If such a body of law is extant and its concern is that "a breach of faith by the receiving government entails international consequences," one can only conclude that this Court will exercise concern that extortion and force constitute a breach of faith with respect to the presentation of causes to foreign courts.

Petitioner submits that over and above this Rule of Foreign relations law, the Fifth Amendment due process clause is involved and was clearly violated.

The extradition here effected was a judicial proceeding commenced in this country by the original Grand Jury Indictment. Every step in that judicial proceeding including

the request for extradition to the Paraguayan Government is subject to review by the courts of this country in order to assure that the person being prosecuted will not be deprived of his liberty without due process of law.

We must accept as fact the petitioner's proffer of proof in this case:

> *"That the United States bribed and extorted the Government of Paraguay to effect the reversal of the Paraguayan Court's determination denying extradition."*

To ask the question whether this conduct was "due process of law" is to answer it.

Petitioner had been deprived of his liberty by illegal and immoral acts, committed by the United States.

It matters not what Branch of the United States Government committed these acts. They were committed in the course of and as part of the prosecution of petitioner and the prosecution must take the full responsibility for such improper and illegal conduct, for the United States Government is an entity and can not be compartmentalized. *United States* v. *Giglio,* 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

POINT V

The conduct of the Trial Judge and the prosecution denied petitioner a fair trial and effective assistance of counsel.

At the outset, petitioner reluctantly must point out that the Trial Judge was scheduled for a serious eye operation in date December or early January. In all fairness, the trial of this case should have been adjourned until after the operation so as to give petitioner an opportunity to properly defend himself. The refusal of requested adjournments deprived petitioner of effective assistance of counsel and this factor plus the conduct of both the Trial Judge and the prosecutor combined to deny petitioner a fair trial. The matter of the improper denial of reasonable time to prepare is covered in petitioner's application to the Circuit Court of Appeals (Appendix H). The matter of the Trial Judge's conduct is summarized as follows:

(1) Counsel for the defendant was forced to take depositions in Paraguay in the week before trial or *to waive testimony of these witnesses.*

(2) Counsel for defendant was obliged to proceed to trial in less than three months—less than one month from date of completion of Bill of Particulars by United States Attorney.

During this time counsel made two trips to Paraguay which entail about 20 hours enroute each way.

(3) Although permission was granted to interview incarcerated witnesses just prior to trial, counsel was unable to do so due to the taking of depositions as set forth above.

(4) At voir dire the Court refused to ask specific questions as to whether jurors had read desig-

nated local and national publications which had carried extensive articles and prominent photographs of the defendant.

(5) The Court continually made comments disparaging counsels knowledge and handling of the trial; as for example "that's what you get when you ask a witness 'why'"

(6) The Court refused to permit any continuing objections even when the testimony and the objector were the same and repeated. In one instance counsel was thus forced to object to 30 questions in a row.

(7) The Court made different and inconsistent rulings on the admission of evidence all in favor of the prosecution. Most important were the following:

Through an arresting officer, the Government introduced over objection an ordinary business card of one Nick Giannatasio taken at random from several cards on his person when he was arrested in February of 1971, which had on it the same telephone number that one of the witness (Gahou) said was told to him by the defendant some ten months earlier in Paraguay.

There was no testimony that either the witness or the defendant had ever seen the card nor that it was even in existence at the time of the defendant's alleged conversation.

Later in the trial the defense offered deposit slips kept in the regular course of business by an international bank, through the testimony of an officer of the bank, which indicated that the alleged co-conspirators had deposited for transfer to Paraguay over $70,000. At the same time they testified to have received $107,000 for the sale of narcotics in New York and the carrying by hand of $100,000 in cash to Paraguay by commercial airlines. This evidence is not only inconsistent with the alleged [illegible] a different method of

The Trial Court admitted the business card of Giannatasio as referred to above and then surprisingly refused to admit the bank deposit slips on the stated grounds that the alleged co-conspirator who made the deposits was not a witness at the trial. Of course, Giannatasio was also not a witness.

The significance of these two offers of solid evidence in a trial consisting for the most part of unsupported testimony of admitted lawbreakers should not be overlooked, as indeed, the business card was requested during their deliberations by the jury.

(8) The Trial Court refused to grant evidenciary hearings on any motions including those respecting jurisdiction and the grand jury proceeding. It was only after a mandamus proceeding to the Court of Appeals, that a partial hearing was granted regarding the warrantless seizure of the evidence.

(9) Although the Court rejected the pre-sentence report of the probation department as improper and highly prejudicial, the Court imposed the maximum sentence permissible without benefit of a proper pre-sentence report.

(10) During the pre-trial hearing on suppression which the Court reluctantly granted to a limited extent, the Court permitted the main witness to claim the Fifth Amendment without even taking the stand, thus preventing counsel from posing a single question to this witness whether such questions might subject him to incrimination or not.

Still further, this same witness who claimed the right not to incriminate himself upon the suppres-

nated local and national publications which had carried extensive articles and prominent photographs of the defendant.

(5) The Court continually made comments disparaging counsels knowledge and handling of the trial; as for example "that's what you get when you ask a witness 'why'"

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Still further, this same witness who claimed the right not to incriminate himself upon the suppres-

sion hearing, had some three months earlier fully confessed to his alleged part in the conspiracy and on the very next day testified at length for the prosecution incriminating himself with any reservation whatever.

(11) The Court refused a twenty-four hour adjournment for an important defense witness to arrive from Argentina.

(12) The Court permitted the prosecutor in his summation to compare appellant to Martin Borman. (At the time of trial these were repeated local press reports about Borman being found in South America and linking this appellant to German activities).

CONCLUSION

The essence of justice is largely procedural. Time and again, thoughtful judges have emphasized this truth.

Mr. Justice Frankfurter: "The history of liberty has largely been the history of procedural safeguards." *McNabb* v. *United States,* 318 U.S. 332, 347, 63 S. Ct. 608, 616, 87 L. Ed. 819 (1943).

Mr. Justice Jackson: "Procedural fairness and regularity are of the indispensable essence of liberty." *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 224, 73 S. Ct. 625, 635, 97 L. Ed. 956 (1953).

See, also, Point IV, *infra* herein, wherein the Paraguayan court initially rendered its opinion denying extradition and stated: "To be free men we must be slaves to the law" (Appendix, pp. 67-89).

As was well stated in *Wilson* v. *United States,* 250 F.2d 312 in commenting on this Court's decision and rationale in *Bollenbach* v. *United States,* 326 U.S. 607:

> "It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty—our system demands he be found guilty in the right way . . ."

This case received wide press and other media coverage not only in the United States but more particularly in South America and Europe.

Citizens of this country have always boasted of the integrity of the administration of justice in United States and the fairness of its trials.

It is respectfully submitted by the petitioner that his prosecution does not come up to the high standards which are the heritage of this country and should be maintained.

Respectfully submitted,

Dated: New York, New York
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